

CHAPTER 6

DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

I. INTRODUCTION

Section 1614.108(b), of Title 29 C.F.R., requires that "the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Pursuant to that regulation, this Chapter prescribes the Equal Employment Opportunity Commission's standards for impartiality and appropriateness in factual findings on formal complaints of discrimination. Further, because continuing education and training for employees working in federal EEO is vitally important, this Chapter also establishes a mandatory minimum training requirement for all investigators, including contract and collateral duty investigators.

This Chapter is intended to ensure that federal agencies consistently develop sound factual bases for findings on claims raised in equal employment opportunity complaints while retaining the maximum flexibility in the use of fact-finding techniques and in the use of established dispute resolution plans. This Management Directive is not intended as an exhaustive guide for conducting investigations, but represents the standard that the Commission expects in an investigation.

II. MINIMUM TRAINING REQUIREMENTS FOR ALL INVESTIGATORS

All new EEO investigators, including contract and collateral duty investigators, must have completed at least thirty-two (32) hours of investigator training before conducting investigations. Individuals serving as EEO investigators as of the date of this publication may also benefit from such training. Agencies have, however, the discretion to decide whether to make this training available to current investigatory staff. In addition to the training requirement for new investigators, all investigators are required to receive at least eight hours of continuing investigator training every year. The Commission has developed training courses to satisfy this requirement and offers them to agencies through its Revolving Fund Program on a fee-for-service basis. Agencies may also develop their own courses to satisfy this requirement or contract with others to provide training, as long as the training meets the standards provided below.

A. New Investigator Training Requirement

The agency should provide training on the following:

1. An overview of the entire EEO process pursuant to 29 C.F.R. Part 1614. This segment must emphasize important time frames in the EEO process, including relevant time frames for investigation.
2. The role and responsibility of an EEO Investigator, as described in this Management Directive.
3. A thorough presentation of the relevant statutes including Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended. This module must explain the theories of discrimination relevant to these statutes, including disparate treatment, adverse impact, and reasonable accommodation theories. This module must provide detailed instruction concerning issues attendant to fragmentation. See Chapter 5, Section III, of this Management Directive.
4. Case management issues, including information on practical techniques concerning the timely investigation of complaints.
5. Remedies, including compensatory damages, attorney's fees, and costs. This module must provide investigators with practical information on how to gather relevant information in cases where

remedies, attorney's fees, and costs are at issue.

6. Investigative techniques, such as the gathering and analysis of evidence. Participants should be provided with an opportunity to get practical, hands-on experience during this module on topics such as interviewing witnesses, making credibility determinations, and the gathering and reviewing of documentary evidence. Participants should be provided with case studies to work with so that investigative skills can be effectively developed.

B. Continuing Investigator Training

The continuing eight hours of investigator training every year is intended to keep EEO investigators informed of developments in EEO practice, law, and guidance, as well as to enhance and develop investigatory skills. Agencies are encouraged to conduct a needs assessment to determine specific investigative staff training needs. The Commission anticipates that this eight hours of continuing investigator training will include segments on legal and policy updates, regulatory and statutory changes, and investigative skills development.

III. CONTENTS OF A COMPLAINT FILE

The complaint file will include the various documents and information acquired during fact-finding under this Directive, indexed and tabbed in accordance with the instructions contained in this Chapter, with pages numbered sequentially. The file will include:

1. The notice of the EEO Counselor to the complainant pursuant to 29 C.F.R. § 1614.105(d).
2. The written report of the EEO counseling efforts pursuant to § 1614.105(c), and any attached documents.
3. A copy of the complaint.
4. Acknowledgment of filing of complaint. If the agency did not accept all of the claims set forth in the complaint, the complaint file should include the agency's partial dismissal determination and the agency's rationale for its action.
5. If the complaint is withdrawn in whole or in part, or otherwise amended or changed, the withdrawal or changes must be in writing and signed by the complainant. A copy of the signed withdrawal or change must be made a part of the complaint file.
6. If resolution of the complaint is reached, the terms of the resolution must be reduced to writing and included in the complaint file.
7. A statement of claim(s) to be investigated.
8. A record of any activity before the EEOC, Office of Federal Operations.
9. Evidence collected by the investigator.
10. A summary of the investigation.

The file should not include:

documentation concerning the substance of attempts to resolve the complaint during informal counseling or during any alternative dispute resolution procedure.

IV. RESPONSIBILITIES

A. Director of Equal Employment Opportunity

The Director of Equal Employment Opportunity shall ensure that 1) all new investigators receive at least thirty-two (32) hours of introductory investigator training before conducting investigations and that all investigators receive at least eight hours of continuing investigator training every year, 2) the claim(s) in a complaint are thoroughly investigated, 3) all employees of the agency cooperate in the investigation, and 4) witness testimony is given under oath or affirmation and without a promise that the agency will keep the testimony or information provided confidential.

The Director will also ensure that individual complaints are properly and thoroughly investigated and that final actions and final decisions are issued in a timely manner in accordance with 29 C.F.R. § 1614.110.

The Director also must ensure that there is no conflict or appearance of conflict of interest in the

investigation of complaints.

B.Equal Employment Opportunity Investigator

The Equal Employment Opportunity Investigator is a person officially designated and authorized to conduct inquiries into claims raised in EEO complaints. The authorization includes the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality. The investigator does not make or recommend a finding of discrimination.

A new investigator must have received, at a minimum, thirty-two (32) hours of investigator training before s/he conducts an investigation; experienced investigators must receive eight hours of training every year.

C.Complainant

The complainant must cooperate in the investigation and keep the agency informed of his/her current address. If an agency is unable to locate the complainant, the agency may dismiss the complaint, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within fifteen (15) days of the notice of proposed dismissal. § 1614.107(a)(6).

Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, coupled with a 15-day notice of proposed dismissal, a failure to respond could result in dismissal of the complaint. See § 1614.107(a)(7); Chapter 5, Section IV.B.1, of this Management Directive.

V.INVESTIGATION

An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such review or inquiry, into claims raised in an EEO complaint.

The investigative process is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence.

A copy of the complaint shall be provided to the investigator prior to the commencement of the investigation. .

Models for the analysis of common types of discrimination cases appear at Appendix L to this Management Directive.

A.Methods of Investigation

Investigative inquiries may be made using a variety of fact-finding models, such as the interview or the fact-finding conference, and a variety of devices, such as requests for information, position statements, exchange of letters or memoranda, interrogatories, and affidavits. The inquiry/review process may also incorporate some of the features of a dispute resolution plan.

B.Purpose of the Investigation

The purpose of the investigation is 1) to gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency subject to coverage under the statutes that the Commission enforces in the federal sector has violated a provision of any of those statutes and 2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.(1)

C.General Investigative Requirements

The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the

treatment of other similarly situated employees, if any(2); and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.

VI. THE ROLE OF THE INVESTIGATOR

A. Collecting and Discovering Factual Information

The role of the investigator is to collect and to discover factual information concerning the claim(s) in the complaint under investigation and to prepare an investigative summary.

B. Variety of Methods Available

The investigator may accomplish his/her mission in a variety of ways. The investigator may function as:

1. a presiding official at a fact-finding conference,
2. an examiner responsible for developing material evidence,
3. an issuer of requests for information in the form of requests for the production of documents, interrogatories, and affidavits, and/or,
4. a face-to-face interviewer in on-site visits.

C. Investigator Must Be Unbiased and Objective

In whatever the mix of fact-finding activity selected for a particular case, the investigator must be and must maintain the appearance of being unbiased, objective, and thorough. S/he must be neutral in his/her approach to factual development. The investigator is not an advocate for any of the parties or interests and should refrain from developing allegiances to them. In addition, the following rules must be observed:

1. The person assigned to investigate shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose.
2. The investigator, if a contract investigator, shall not have been hired by or be obligated to the person(s) involved in the claims giving rise to the complaint. For example, where the contract monitor of EEO investigation contracts is alleged to have been involved in discriminatory activity, the use of the usual contract investigator would create an apparent bias because there is at best the appearance that the contract investigator could not be impartial.
3. An agency is prohibited, in some situations, from using its own immediate investigative resources, even though the investigation of discrimination complaints in the federal service is primarily an agency function and responsibility. In such cases the agency shall use alternatives, such as contract investigators or other outside sources. Such situations include, but are not limited to:
 - a. Particularly sensitive cases involving high-level officials (e.g., complainant is an immediate subordinate of the head of the agency and the head of the agency is alleged to have taken discriminatory action).
 - b. Potential conflict of interest (e.g., complainant is an employee in the EEO office and names the EEO director as the person taking the wrongful action).
 - c. A small agency unable to carry out an unexpected EEO workload (e.g., an agency with fewer than 450 employees, has a staff of part-time or ad hoc EEO investigators, and is unable to absorb an additional investigative caseload).

D. Investigator Must Be Thorough

This means identifying and obtaining all relevant evidence from all sources regardless of how it may affect the outcome. Investigators need not expend the same amount of investigatory effort on each case, however. The proper scope of an investigation is dictated by the facts at issue. Investigators should not take a cookie-cutter, one-size-fits-all approach, as that wastes resources and delays resolution of the complaint. The investigation and the amount of effort expended should be appropriate to determine the claims raised by the complaint. An appropriate investigation is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

The investigator need not concern him/herself with balancing the amount of evidence supporting the

complainant as compared with the amount of evidence supporting the agency. To ensure a balanced record, it is necessary only to exhaust those sources likely to support the complainant and the respondent. An investigation conducted in this manner might reveal that there is ample evidence to support the complainant's claims and no evidence to support the agency's version of the facts, or vice versa. Nevertheless, this investigation would be thorough.

VII.EVIDENCE

A.Quality of Evidence

Evidence will be gathered from the complainant, witnesses, and other sources. In order to support findings and, ultimately, decisions, this evidence should be material to the complaint, relevant to the issue(s) raised in the complaint, and as reliable as possible.

1.Material Evidence

Evidence is material when it relates to one or more of the issues raised in the complaint or raised by the agency's answer to it. To determine whether evidence is material, one must look to the claims of discriminatory conduct and resultant harm contained in the complaint and the agency's answers to the claims. If the evidence relates to one or more of those claims, then it relates to the issues presented in the complaint, and it is material.

2.Relevant Evidence

Evidence is relevant if it tends to prove or disprove a material issue raised by a complaint. Relevancy and materiality are often used interchangeably. Generally, relevance is the more important concept in an investigation. If evidence is not relevant, whether it is material is of little consequence. A test of relevance is to ask, "What does this evidence tend to prove?" If the answer is that it tends to prove or disprove a proposition that is related to the complaint, then the evidence is relevant.

3.Reliable Evidence

Evidence is reliable if it is dependable or trustworthy. Evidence should not be ignored because it is of questionable reliability. Such evidence may lead to evidence that is reliable.

Some factors to consider in determining whether testimony is reliable are: whether the witness's testimony is based on his/her own experience and personal knowledge, or based on rumor, hearsay, or innuendo; whether the testimony is a statement of fact or is merely a conclusion; and whether witnesses have an interest in the outcome of the complaint, or are otherwise biased.

Some factors to consider in determining whether documents are reliable are: whether they were prepared in response to the investigation or whether they are maintained in the ordinary course of business; whether they are obtained from the custodian of records or the author of the document; and whether they are copies or original documents and whether the documents are signed and/or dated.

The rules of evidence were designed to set limits on the reliability of documents and testimony entered in evidence in court. Such formal rules will not be strictly applied in the collection of evidence for the investigation of federal equal employment opportunity complaints. Such rules may be used, however, as a guide in assessing the evidentiary weight to be given particular items of evidence.

B.Types of Evidence

There are many types of evidence which can be obtained on the issues raised in an equal employment complaint. The three basic types of evidence are circumstantial evidence (e.g. comparative evidence or

other evidence giving rise to an inference of discrimination), direct evidence, and statistical evidence.

1.Comparative Evidence

Comparative evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC. One of the challenges of developing comparative evidence is gathering sufficient evidence to determine whether the comparators are similarly situated with respect to the complainant. In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant's treatment.(3)

2.Direct Evidence

Direct evidence of discrimination consists of facts revealing that intentional discrimination caused an adverse action. Direct evidence of discrimination means that one need not resort to inference or circumstantial evidence.

Direct evidence is relevant in cases involving disparate treatment where the question is whether the employer intentionally treated employees differently because of a protected factor. It is also relevant in cases involving the effect of policies where the question is whether the policy disparately treats all employees in the protected class.

Direct evidence is rare. The statement, "I would never hire you for that job because you are a woman," is direct evidence of discrimination on the basis of sex in hiring but would not be direct evidence if the issue involved a performance appraisal, for example. Care must be taken to distinguish between direct evidence of bias and direct evidence of discrimination. Direct evidence of bias may be strong but circumstantial evidence of discrimination in a particular case. For example, the statement, "I would never hire a woman for that job," is direct evidence of bias, as not directed towards any specific person. See *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993). A statement to a complainant that you "may be getting too old to understand the store's new computer programs" was deemed direct evidence of age discrimination in *Wright v. Southland Corp.*, 1999 WL 688051 at *16 (11th Cir. 1999).

3.Statistical Evidence

Statistical evidence or a survey of the general environment may be conducted as appropriate. For example, this evidence may be probative when claims involve the comparative treatment of groups, as in a claim of a pattern or practice of discrimination, or the adverse effect of an agency policy or practice.

C.Sources of Evidence

1.The Complainant

The complaint will generally provide the initial information concerning the bases, issues, and incidents that gave rise to the complaint of discrimination. The complaint may also indicate the reason, if any was given, for any adverse employment decision. Additional background and detailed information must be obtained from the complainant and recorded through written questions and answers (interrogatories), recorded interviews (using handwritten notes or verbatim transcription), an exchange of letters or memoranda, or a fact-finding conference. This information

should include medical documentation, where necessary. Witness testimony intended to be made a part of the complaint file should be made under oath or affirmation or penalty of perjury.

Volume II of the EEOC Compliance Manual will assist in developing inquiries. That volume contains substantive topics arranged in sections. Most sections contain advice on what questions to ask when certain issues are raised. The Commission's Compliance Manual is published commercially and is available at many libraries and at the Commission's district, area, and field offices. In addition, newly issued sections of the Compliance Manual and Commission policy guidance on issues such as reprisal, definition of disability, reasonable accommodation and sexual harassment are available on the Commission's web site, www.eeoc.gov, or from the EEOC information line at 1-800-USA-EEOC.

2.The Agency

Information from the agency may be obtained initially through a request for information. Consult the agency Director of EEO or EEO officer for instructions concerning to whom to direct the request. The EEOC Compliance Manual, Volume I, Section 26.3, provides some guidance on developing requests for information.

Follow-up information should be obtained in a variety of ways, including further requests, affidavits, interrogatories, or a fact-finding conference.

In most instances, the individual who initiated or enforced the decision or engaged in the action about which the complaint was filed should be interviewed early in the investigation. His/her reasons for the action will often open other avenues to explore.

3.Witnesses

Witnesses can be identified by asking the complainant, the official involved in the alleged discriminatory action, or other obvious witnesses if they are aware of other persons who might have information related to the complaint. Witnesses need not be employees at the respondent agency.

- a.The EEO staff may be of some assistance in discovering other witnesses, but they should rarely be witnesses themselves. Their information will usually be hearsay and their participation as witnesses would compromise their objectivity. Information should be obtained from its primary source.
- b.Witness bias should be noted when it is discovered. The following should be noted: 1) favorable feelings toward a party based on a mutual alliance, family ties, or close friendship; 2) hostility to a party, because of a past disagreement; and 3) self-interest in the outcome of the complaint are some indicators of potential bias. The indicators should be made a part of the record, and efforts should be made to corroborate the testimony. The weight accorded the evidence adduced from such witnesses will be governed by the degree to which it can be determined that the bias colored the testimony.

4.Documentary Evidence

All relevant documents should be obtained. The complainant, the supervisor, the manager who took the personnel action, or the personnel office of the agency may be sources to help identify relevant documents.

Statistical evidence usually can be obtained through the EEO Office or the personnel office of the agency.

D.Evidence on the Question of Remedies

Evidence should be gathered from which an appropriate remedy can be fashioned. This essentially

means that a determination of the parameters of relief should be made and the appropriate inquiries developed. Agencies should be aware that, during the investigative process, they need to address evidence that may be used in connection with framing remedies. Evidence on the question of remedies may include evidence of a complainant's interim earnings or subsequent promotions (in a discharge or non-promotion case), compensatory damages, or other mitigating factors. (For a source of information concerning compensatory damages, see Enforcement Guidance, Compensatory & Punitive Damages Available under § 102 of the Civil Rights Act of 1991, N-915.002 (July 14, 1992).(4)

VIII. WITNESSES AND REPRESENTATIVES IN THE FEDERAL EEO PROCESS

The procedures outlined here relate specifically to the processing of individual complaints of discrimination under § 1614.108. The principles reflected in these procedures, however, should also guide the processing of class complaints of discrimination under § 1614.204.

A. Disclosure of Investigative Material to Witnesses

1. To the complainant

The complainant must receive a copy of the complaint file and a transcript of the hearing, if a hearing is held.

2. To other witnesses

Agencies may disclose information and documents to a witness who is a federal employee where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, e.g., to explain the claims in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason.

B. Travel Expenses

1. Witness Employed by the Federal Government

Section 1614.605(f) requires that a witness be in an official duty status when his/her presence is required or authorized by agency or Commission officials in connection with a complaint. A witness is entitled to travel expenses. If a witness is employed at an agency other than the one against which the complaint is brought and must travel to provide the attestation or testimony, the witness is entitled to reimbursement for travel expenses. The current employing agency of a federal employee must initially authorize and pay the employee's travel expenses and is entitled to reimbursement from the responding agency, which is ultimately responsible for the cost of the employee's travel. Decision of the Comptroller General, Matter of John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 69 Comp. Gen. 310 (1990). An agency would not be responsible for paying the travel expenses of non-federal witnesses.

2. Outside Complainant or Applicant Not Employed by Federal Government

The agency is not responsible, however, for paying the travel expenses of an "outside" complainant or applicant. Although the complainant who, for purposes of his/her complaint is a witness, may once have been employed by the agency against whom s/he complains, the termination of the employment status with the federal government also terminates any federal obligation to pay travel expenses associated with prosecution of the complaint. Decision of the Comptroller General, Matter of: Expenses of Outside Applicant Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654 (1982).

C. Official Time

Section 1614.605 provides that complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled

to a reasonable amount of official time to present the complaint and to respond to agency requests for information, if otherwise on duty. § 1614.605(b). Former employees of an agency who initiate the EEO process concerning an adverse action relating to their prior employment with the agency are employees within the meaning of § 1614.605, and their representatives, if they are current employees of the agency, are entitled to official time. Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with the complaint.

1. Reasonable Amount of Official Time

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of such time. Time spent commuting to and from home should not be included in official time computations because all employees are required to commute to and from their federal employment on their own time.

2. Meeting and Hearing Time

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime.

3. Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved. However, because investigations are conducted by agency or Commission personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

4. Aggregate Time Spent on EEO Matters

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for

representational activities will vary with the circumstances.

Moreover, § 1614.605(c) provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has a designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases against other federal agencies. However, the Commission encourages agencies to provide such official time.

5. Requesting Official Time

The agency must establish a process for deciding how much official time it will provide a complainant. Agencies further must inform complainants, their representatives, and others who may need official time, such as witnesses, of the process and how to claim or request official time.

6. Denial of Official Time

If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reasons for the denial. If the agency's denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant's subsequently files a complaint.

D. Duty Status/Tour of Duty

For purposes of these regulations, "duty status" means the complainant's or representative's normal hours of work.

It is expected that the agency will, to the extent practical, schedule meetings during the complainant's normal working hours and that agency officials shall provide official time for complainants and representatives to attend such meetings and hearings.

If meetings, conferences, and hearings are scheduled outside of the complainant's or the representative's normal work hours, agencies should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within the discretion of the agency.

Any reasons for an agency's denial of official time should be fully documented and made a part of the complaint file.

Witnesses who are federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another federal agency, must be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

E. Use of Government Property

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors) must be authorized by the agency and must not cause undue disruption of agency operations.

IX. COMPLAINT FILE

A.Contents of the Complaint File

The complaint file will be assembled in a suitable binder, have a title page (see Appendix M of this Management Directive), and contain all documents pertinent to the complaint, including the following:

- 1.The notice of the EEO Counselor to the complainant pursuant to 29 C.F.R. § 1614.105(d).
- 2.The written report of the EEO counseling efforts pursuant to § 1614.105(c), and any attached documents.
- 3.A copy of the complaint.
- 4.Acknowledgment of filing of complaint. If the agency did not accept all of the claims set forth in the complaint, the complaint file should include the agency's partial dismissal determination and the agency's rationale for its action.
- 5.If the complaint is withdrawn in whole or in part, or otherwise amended or changed, the withdrawal or changes must be in writing and signed by the complainant. A copy of the signed withdrawal or change must be made a part of the complaint file.
- 6.If resolution of the complaint is reached, the terms of the resolution must be reduced to writing and included in the complaint file.
- 7.A statement of claim(s) to be investigated.
- 8.A record of any activity before the EEOC, Office of Federal Operations.
- 9.Evidence collected by the investigator.
- 10.A summary of the investigation.

B.Features of the Complaint File

The completed complaint file shall have the following features:

- 1.Case index to documents and exhibits.
- 2.Tabbed sections for documents, exhibits, and explanatory material.
- 3.A typed summary of the investigation signed and dated by the investigator and containing a discussion and analysis of the evidence. See Section VIII of this Chapter and Volume 2, EEOC's Compliance Manual for further guidance.

C.Format for the Complaint File

The following is a suggested format for complaint files.

Binder

Heavy-duty cover or binder.

Title Page

See Appendix M.

Summary

Summary of investigation/summary analysis of the facts. The summary should cite to exhibits and evidence.

Case Index

The index to the file should list the contents of the file by tab and sequential page number.

Tab A

Tab A should contain the formal complaint and documents submitted by the complainant. (Individual documents under each tab should be consecutively numbered in addition to being identified as part of the tab. Example A-1, A-2, A-3, etc.).

Tab B

Tab B should contain the EEO Counselor's report and all documents generated in the informal process. Included here should be the notice of right to file a complaint.

Tab C

Tab C should contain the agency's notice of claims to be investigated pursuant to Section IV.A.1 of this Chapter. Copies of any other documents bearing on delineation of the claims to be investigated should also be included. Documents pertaining to the partial dismissal of claim(s) should be included in this tab.

Tab D

Tab D should document attempts at informal resolution; however, documentation should not include the substance of such attempts.

Tab E

Tab E should contain any documentation of appellate activity and any decisions affecting the processing of the complaint.

Tab F

Tab F should contain the evidence and documents in a logical order, with documents further separated by numerical tabs as necessary.

Tab G

Tab G should contain any miscellaneous material.

D.Availability of Complaint Files

The complainant and his/her representative shall be entitled to one copy each of the complaint file and investigative summary either at the time that the investigation is completed or when the agency send the complainant the notice required by § 1614.108(f), whichever is earlier.

E.Disposition of Complaint Files

1.Effective December 8, 1998, the National Archives and Records Administration (NARA) revised General Records Schedule (GRS) 1, Item 25, titled Equal Employment Opportunity Records, provides:

Equal Employment Opportunity Records.

a.a. Official Discrimination Complaint Files.

Originating Agency's file containing complaints with related correspondence, reports, exhibits, withdrawal notices, copies of decisions, records of hearings and meetings, and other records as described in 29 C.F.R. Part 1614.(5)

Authorized Disposition

Destroy four years after resolution of case.

- 2.The agency originating the equal employment opportunity case will retain the original ("official") file during the appeals process and send only duplicate copies of documents to EEOC for use in the appeal. The agency sending the duplicates will certify that the file contains everything that is in the original.
- 3.EEOC will create documents relating to the appeal, but will file such documents apart from the materials sent by the originating agency. After resolution of the appeal, the Commission will destroy all duplicate materials, but will retain the appeals documentation for four years. The originating agency will retain the original file for four years after resolution of the case. EEOC will retain the appeals documentation and will answer Freedom of Information Act requests on the appeals file. The EEOC will maintain the security of documents as required by Federal Statutes and Executive Orders.
- 4.The originating agency will be responsible for retiring the original case file to the Federal Records Center, and answering Freedom of Information Act requests on the original file. Requests for disclosure, which the EEOC determines are requests for the agency's complaint file, will be forwarded to the agency for a response.
- 5.Further information concerning the disposition of records under this section may be obtained by reviewing NARA GRS 1, Transmittal 8, which is available on the NARA web site at www.nara.gov(6) or by contacting:

Equal Employment Opportunity Commission
Office of Federal Operations

P.O. Box 19848
Washington, D. C. 20036

Telephone : (202) 663-4599

TDD : (202) 663-4593

X.THE INVESTIGATIVE SUMMARY

The investigative summary is a narrative document that succinctly states the issues and delineates the evidence addressing both sides of each issue in the case. The summary should state facts (supported in the complaint file) sufficient to sustain a conclusion(s). The summary should cite to evidence and the exhibits collected.

XI.COMPLAINANTS' OPPORTUNITY TO REVIEW THE INVESTIGATIVE FILE

Within the appropriate time frame for finishing an investigation under § 1614.108(e), and prior to issuance of the notice required by § 1614.108(f), agencies are encouraged to allow complainants and their designated representatives an opportunity to examine the investigative file and to notify the agency, in writing, of any perceived deficiencies in the investigation prior to transferring the case to the EEOC for a hearing or prior to issuing a final decision without a hearing. A copy of the complainant's notification to the agency of perceived deficiencies must be included in the investigative file together with a written description by the agency of the corrective action taken.

If the agency agrees with alleged deficiencies in the investigation as identified by the complainant, the agency must immediately correct them. If the investigation period has ended or is about to end, the agency should request agreement from the complainant to extend the investigation period for pursuant to § 1614.108(e). If the agency does not agree with the complainant's claimed deficiencies in the investigative file, the agency will prepare a statement explaining the rationale for the disagreement and include it in the investigative file along with the complainant's notice of claimed deficiencies.

XII.SANCTIONS FOR FAILURE TO COOPERATE DURING THE INVESTIGATION

Section 1614.108(b) requires that an agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the written complaint. EEOC Administrative Judges and the Office of Federal Operations have the authority to issue sanctions against an agency for its failure to develop an impartial and appropriate factual record in appropriate circumstances. Moreover, agencies and complainants each have a duty to cooperate with the investigator during the investigation. In § 1614.108(c)(3), a party-the complainant as well as the agency- may be subject to sanction where it fails to comply with a request of the investigator for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses. The investigator shall make a note in the investigative file concerning the party's failure without good cause shown to comply and the decisionmaker (Administrative Judge during the hearing process or the agency where the complainant requests a final agency decision) or the Commission on appeal may, in appropriate circumstances:

- 1.draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- 2.consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
- 3.exclude other evidence offered by the party failing to produce the requested information or witness;
- 4.issue a decision fully or partially in favor of the opposing party; or
- 5.take such other actions as it deems appropriate.

An investigator should inform the party from which it seeks documents, records, comparative data, statistics, affidavits, or the attendance of witnesses that a failure to comply with the request may lead to the imposition of sanctions from the decisionmaker or the Commission on appeal. An investigator may, in an initial request for documents (etc.), advise the party that, absent good cause shown, the party has a duty to respond fully and in a timely fashion to the investigator's request and that a failure to do so may result in sanctions set forth at §

1614.108(c)(3). Where the investigator does not so inform the party upon making the request, s/he may advise the party upon the party's failure to comply with the request. If the investigator properly advised the party that a failure to comply with the request may result in the sanctions set forth at § 1614.108(c)(3), the decisionmaker or Commission on appeal may impose such sanctions upon receipt and review of the complaint/appeal file.

XIII.SANCTIONS FOR FAILURE TO DEVELOP AN IMPARTIAL AND APPROPRIATE FACTUAL RECORD

Where it is clear that the agency failed to develop an impartial and appropriate factual record, an Administrative Judge may exercise his/her discretion to issue sanctions. In such circumstances, the sanctions listed in § 1614.109(f)(3) are available. See *McDuffie v. Department of the Navy*, EEOC Request No. 05880134 (1988) (adverse inference can be drawn from agency's failure to include relevant statistical information in the file); *Wasser v. Department of Labor*, EEOC Request No. 05940058 (1995) (Administrative Judge appropriately imposed an adverse inference where the agency failed to provide requested documents); *Stull v. Department of Justice*, EEOC Appeal No. 01941582 (1995) (a complainant may be awarded interim attorney's fees as a sanction for failure to produce records requested during discovery even where s/he is unsuccessful on the ultimate issue of discrimination)(7); and *Comer v. FDIC*, EEOC Request No. 05940649 (May 31, 1996) (Administrative Judge has the authority to order the agency to reimburse appellant for costs resulting from the agency's bad faith conduct in failing to appear for properly scheduled depositions).

Before an Administrative Judge may sanction an agency for failing to develop an impartial and appropriate factual record, the Administrative Judge must issue an order to the agency or request the documents, records, comparative data, statistics, or affidavits. § 1614.109(f)(3). Such order or request shall include a notice to show cause to the agency and, in appropriate circumstances, may provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record. The Administrative Judge also shall provide the agency with a reasonable period of time within which to take the action that the Administrative Judge has deemed necessary. The order or request further must identify the sanction(s) that the Administrative Judge may impose if the agency fails to comply with it. Only on the failure of the agency to comply with the Administrative Judge's order or request and the notice to show cause may the Administrative Judge impose a sanction or the sanctions identified in the order or request.(8)

XIV.OFFER OF RESOLUTION

The Commission encourages the resolution of complaints at all times in the complaint process through a variety of settlement mechanisms. Section 1614.109(c) provides for one of these mechanisms by permitting agencies to make an "offer of resolution" to complainants. The Commission believes that this provision will provide incentive for agencies and complainants to resolve complaints and that it will conserve agency resources where settlement reasonably should occur. If a complainant does not accept an offer of resolution made in accordance with the requirements of § 1614.109(c) and subsequently obtains less relief than had been offered, the complainant's attorney's fees will be limited, as described below. It should be emphasized that the offer of resolution is only one mechanism by which complaints may be settled.

A.Elements of the Offer

An offer of resolution made pursuant to § 1614.109(c) can be made to a complainant who is represented by an attorney at any time after the filing of a formal complaint until thirty (30) days before a hearing. If, however, the complainant is not represented by an attorney, an offer of resolution cannot be made before the case is assigned to an Administrative Judge for a hearing. (These time and representation provisions apply only to offers of resolution and do not restrict the parties from discussing settlement or engaging in an alternate dispute resolution process in an effort to resolve an EEO complaint.)

Complainants have 30 days from receipt of an offer of resolution to consider the offer and decide whether to accept it. Offers of resolution must be in writing and must explain to the complainant the possible consequences of failing to accept the offer. The agency's offer, to be acceptable, must include

attorney's fees and costs, and must specify any non-monetary relief. The agency may offer a lump sum payment that includes all forms of monetary liability, including attorney's fees and costs, or the payment may itemize the amounts and types of monetary relief being offered. Complainant's acceptance of the offer must also be in writing. Upon acceptance, the complaint is settled in full and processing ceases.

If a complainant decides not to accept the offer, the agency takes no immediate action, and the complaint continues to be processed normally. After the hearing is completed, if the Administrative Judge (or the Commission on appeal) concludes that discrimination has occurred, but provides for less relief than the amount offered by the agency earlier in its offer of resolution, then the agency may use complainant's decision not to accept its offer of resolution to argue for a reduction in its obligation to pay complainant's attorney's fees. In general, if a complainant fails to accept a properly made offer, and the relief ordered on the complaint is not more favorable than the offer, then the complainant will not receive payment from the agency for attorney's fees or costs incurred after the expiration of the 30-day acceptance period.

It should be noted, however, that an exception to this general rule exists where the interests of justice would not be served. An example of an appropriate use of the interest of justice exception is where the complainant received an offer of resolution, but was informed by a responsible agency official that the agency would not comply in good faith with the offer (e.g., would unreasonably delay implementation of the relief offered). If the complainant did not accept the offer for that reason, and then obtained less relief than was obtained in the offer, it would be unjust to deny attorney's fees and costs.

A complainant's failure to accept an offer of resolution does not preclude the agency from making other offers of resolution or either party from seeking to negotiate a settlement of the complaint at any time.

When comparing the relief offered in an offer of resolution with that actually obtained, the Commission intends that non-monetary as well as monetary relief be considered. Although a comparison of non-monetary relief may be inexact and difficult in some cases, non-monetary relief can be significant and cannot be overlooked. Attorney's fees and costs incurred after the offer of resolution may not be included in the amount actually obtained for comparison purposes. For guidance, parties may wish to refer to court cases deciding issues involving an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure. See, for example, *Marek v. Chesny*, 473 U.S. 1 (1985). While not identical, the EEOC's offer of resolution provision was modeled on the Rule 68 offer of judgment process.

B. Model Language for the Offer

The preamble to the Commission's regulations noted that this Management Directive would include model language for agency use in extending offers of resolutions:

This offer of resolution is made in full satisfaction of the claims of employment discrimination that you have made against [name of agency] in [identify the complaint by number or other clear and unambiguous designation]. This offer includes all of the monetary and/or non-monetary relief to which you are entitled, including attorney's fees and costs.

[For complainants who are not represented by counsel, include this paragraph:]

Your acceptance of this offer must be made in writing and postmarked or received in this office within thirty (30) days of your receipt of the offer. If you accept this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[For complainants represented by counsel, substitute the following paragraph:]

The complainant's acceptance of this offer must be made in writing and postmarked or received in this office within thirty (30) days of your receipt of the offer. If the complainant accepts this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. Please also obtain the signature of the complainant, which should be placed on the line appearing above [his/her] name and include the date of [his/her] acceptance on the line appearing adjacent to [his/her] name. This offer will not be deemed to have been accepted without the signature of both you and the complainant. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[The following paragraphs must be included in offers sent ALL to complainants:]

If you do not accept this offer of resolution and the relief that you are eventually awarded by the Administrative Judge, or the Equal Employment Opportunity Commission on appeal, is less than the amount offered, you will not receive payment for the attorney's fees or costs that you incur after the expiration of the 30-day acceptance period for this offer. The only exception to this rule is where the Administrative Judge or Commission rules that the interests of justice require that you receive your full attorney's fees and costs.

1. The Commission enforces: (1) Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; (2) Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; (3) Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; and (4) the Equal Pay Act, Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 296(d).
2. Investigators are reminded that even where the complainant is unable to provide comparative data and the investigator similarly cannot obtain any such information, the investigator still must determine whether there is other evidence that may establish unlawful discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Supreme Court ruled that comparative evidence is not an essential element of a prima facie case of discrimination, but the complainant must come forward with sufficient evidence to create an inference of discrimination; that is, enough evidence that, if unrebutted, would support an inference that the agency's actions resulted from discrimination. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 576 (1978). The EEOC has issued enforcement guidance on *O'Connor*, entitled "EEOC Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*," (September 18, 1996), which is available on the EEOC web site at www.eeoc.gov, in the "Enforcement Guidances and related Documents" section or by calling the EEOC information line at 1-800-USA-EEOC.
3. As discussed in note 2, while comparative evidence is important, it is not always available and an investigator may be able to obtain other evidence of discrimination. So while the investigator should make an effort to obtain comparative evidence, s/he also should make an effort to determine whether there may be other evidence equally probative of discrimination.
4. The Commission prepared this Enforcement Guidance for use in both public and private EEO litigation. The discussion in the Enforcement Guidance concerning punitive damages does not apply to federal sector EEO.
5. See Section II of this Chapter for a description of the documents contained in the complaint file. There is no difference intended with respect to the items that may be destroyed after 4 years.
6. The web site for the General Records Schedule is "<http://ardor.nara.gov/grs/index.html>."
7. In *Stull*, the Commission has held that where an adverse inference has been awarded for discovery abuse, appellant is entitled to reasonable attorneys fees "incurred in connection with the attempt to have an adverse inference drawn."
8. Where an agency did not complete an investigation of late-filed amendments to complaints or late-consolidated

complaints because the complainant either requested a hearing before the full investigatory period ended or the amendments and consolidation occurred late in the process, sanctions for inadequate records would be inappropriate. Sanctions only would be appropriate where a party subsequently fails to comply with an order or request of the Administrative Judge that puts the party on notice of the type of sanction that may be imposed for noncompliance.

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